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United States v. *General Dynamics Corp.*, 415 U.S. 486 — 24, 56, 61
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United States v. *Trans Texas Bancorp.*, CCH 1972 Trade Cases 74,257, affirmed, 412 U.S. 946 — 19, 25, 54, 55
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12 U.S.C. (1958 ed.) 1846 — 52
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Austin and Solomon, *A New Antitrust Problem: Vertical Integration in Correspondent Banking*, 122 U. Pa. L. Rev. 366 (1974)	37
Berle, *The Theory of Enterprise Entity*, 47 Colum L. Rev. 343 (1947)	28
Douglas & Shanks, *Insulation from Liability through Subsidiary Corporations*, 39 Yale L.J. 193 (1929)	29
H.R. 6227, 84th Cong., 1st Sess.	45
Knight, *Correspondent Banking, Pt. I, Balances & Services*, Monthly Review of The Federal Reserve Bank of Kansas City (November 1970)	37
Powell, *Parent and Subsidiary Corporations* (1931)	29
Stevens, *Corporations* (2d ed. 1949)	29
Correspondent Relations: A Survey of Banker Opinion, Subcommittee on Domestic Finance, House Committee on Banking and Currency, 88th Cong., 2d Sess.	37
S. 2577, 84th Cong. 1st Sess.	45
S. Rep. No. 1095, 84th Cong., 1st Sess.	45
Wixon, Kell, Bradford, *Accountants Handbook* (5th ed. 1970)	31

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1933

UNITED STATES OF AMERICA, APPELLANT

v.

CITIZENS AND SOUTHERN NATIONAL BANK, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court's findings of fact, conclusions of law and order (J.S. App. A, 1a-69a) are reported at 372 F. Supp. 616.

JURISDICTION

The judgment of the district court (J.S. App. A, 69a) was entered on January 25, 1974. The notice of appeal to this Court (J.S. App. C, 73a-74a) was filed on March 25, 1974. On April 16, 1974, Mr. Justice Powell extended the time for docketing the appeal to June 24, 1974, and the appeal was docketed on that date. The Court noted probable jurisdiction on Oc-

tober 21, 1974 (App. E-1842).[1a] The jurisdiction of this Court is conferred by Section 2 of the Expediting Act, 15 U.S.C. 29.

QUESTIONS PRESENTED

1. Whether arrangements whereby six separate and independent banks operate as *de facto* branches of a larger independent bank competing in the same markets, and pursuant to which each such bank and the larger bank exchange information and other resources and jointly determine competitive strategy, violate Section 1 of the Sherman Act.

2. Whether the Bank Holding Company Act of 1956 ousts antitrust courts of jurisdiction to determine the foregoing question, by vesting exclusive jurisdiction over such issues in the Board of Governors of the Federal Reserve System.

3. Whether the acquisition by the largest bank in the Atlanta area of five independent banks there, which are not acting as competitors because they have undertaken to operate as its *de facto* branches, violates Section 7 of the Clayton Act.

STATUTES INVOLVED

Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18; Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. 1; and Subsection 5(B) of the Bank Merger Act of 1966, 80 Stat. 8, as amended, 12 U.S.C. 1828(c)(5)(B), are set forth in Appendix E to the jurisdictional statement (J.S. App. 88a-89a).

[1a] The appendix volumes containing exhibits have been separately paginated. "App. E" references are to the exhibit volumes. "App." references are to the other appendix volumes.

STATEMENT

The United States filed this civil antitrust action challenging the relationships between the Citizens and Southern banking organization ("C&S" or the "C&S System"), the largest banking organization in Atlanta, Georgia, and six legally-independent banks in the Atlanta suburbs, which voluntarily operate as *de facto* branches of C&S, as violating Section 1 of the Sherman Act. The complaint also challenged C&S's proposed acquisition of five of these banks, pursuant to agreements entered into in 1970, as violating Section 7 of the Clayton Act. After trial on the merits, the district court entered judgment for the defendants, appellees here (J.S. App. 1a–69a).

A. THE DEFENDANTS

1. *The Citizens and Southern Banking System.* The C&S System consists of Citizens and Southern National Bank ("C&S National"), its wholly-owned subsidiary Citizens and Southern Holding Company ("C&S Holding"), and eight banks operating in Georgia in which C&S Holding owns a majority stock interest (J.S. App. 2a–3a; DX 266, p. 116; App. E–457).

C&S National, the lead bank in the C&S System, is also a registered bank holding company under federal law (J.S. App. 2a). See 12 U.S.C. 1844(a). Its home office is in Savannah but it operates more than 60 banking offices in six Georgia cities, about 40 of which are located in the Atlanta area (J.S. App. 2a).

Through C&S Holding, the C&S System presently owns a majority stock interest in three state-chartered

banks in the Atlanta area which operate a total of ten offices there. The challenged acquisitions are to be made by two of these banks: "C&S Emory" and "C&S East Point" (J.S. App. 2a–4a, 6a).

C&S's combined assets of $1.7 billion, combined deposits of $1.4 billion, and combined loans and discounts of $1.1 billion as of June 30, 1970, made it Georgia's largest banking organization. In the Atlanta area, C&S on December 31, 1971, had deposits of approximately $1 billion. Its 30 percent share of the total deposits held by the 31 banking organizations operating there made it the largest in the Atlanta area (J.S. App. 2a, 38a–40a).

2. *The "Five-Percent" Defendant Banks.* Between 1957 and 1969, C&S assisted in the organization of a number of independent banks in the Atlanta suburbs. C&S Holding acquired a five percent stock interest in these banks when they were organized, and they are sometimes referred to as the "five-percent banks" (see pp. 5–7, *infra*). There is no dispute that: these five-percent banks are, and always have been, legally-independent institutions (in contrast, for example, to the banks in which C&S Holding owns a majority stock interest, such as C&S Emory and C&S East Point); the management of each five-percent bank owes fiduciary obligations to all of that bank's stockholders; each five-percent bank has the capacity or power to make its competitive decisions independently of C&S; and insofar as the management of each five-percent bank submits to the direction of C&S it does so voluntarily (see pp. 6–12, *infra*). Indeed, appellees have referred to the relationship between C&S and the

five-percent banks as one of "voluntary control" (see, *e.g.,* Defendants' Memorandum Regarding Effect of the Citizens and Southern National Bank, et al. v. Independent Bankers Association of Georgia (Supreme Court of Georgia, November 15, 1973) [202 S.E. 2d 78], dated November 16, 1973, p. 5 ("Memorandum Regarding Effect")).

By means of this "voluntary control" the five-percent banks are operated as though they are branches in the C&S System; thus, although the five-percent banks are legally independent, C&S refers to them as its *de facto* branches (see, *e.g.,* DX 267, p. 2; App. E-462).

Each of the five-percent banks C&S proposes to acquire has "a large number of shareholders * * * and no single shareholder owns a significant number of the shares of any such bank" (J.S. App. 43a).

Sandy Springs. Sandy Springs is a community in Fulton County adjoining the north side of the City of Atlanta. Organized in 1959, the Citizens National Bank of Sandy Springs began operating in 1960. In 1969 it converted from a national to a state-chartered bank and adopted the name Citizens and Southern Bank of Sandy Springs. It has one office, and had assets of $22 million, deposits of $19 million and net loans and discounts of $11.7 million as of December 31, 1970 (*id.* at 5a–6a).

Chamblee. Chamblee is located northeast of Atlanta in DeKalb County. The Chamblee National Bank, organized in 1960, converted in 1969 from a national to a state-chartered bank and adopted the name Citizens and Southern Bank of Chamblee. It has two

offices, and had assets of $21.1 million, deposits of $18.7 million, and loans and discounts of $10.7 million as of December 31, 1970 (*id.* at 4a).

North Fulton. The Citizens and Southern Bank of North Fulton, a state-chartered bank, was organized in 1967 in a community in the portion of Fulton County north of Atlanta. It has one office, and had assets of $7.7 million, deposits of $6.3 million and loans and discounts of $5.6 million as of December 31, 1970 (*id.* at 5a).

Park National. Citizens and Southern Park National Bank was organized in 1967 in Executive Park, located north of Atlanta in DeKalb County. It has one office, and had assets of $11.1 million, deposits of $9.8 million, and loans and discounts of $3.5 million as of December 31, 1970 (*id.* at 4a).

South DeKalb. Citizens and Southern South DeKalb Bank, a state-chartered bank, was organized in 1969 southeast of Atlanta in DeKalb County. It has two offices, and had assets of $5.1 million, deposits of $4.3 million, and loans and discounts of $2.1 million as of December 31, 1970 (*id.* at 4a–5a).

The five banks that C&S proposes to acquire operate seven offices, all in the Atlanta metropolitan area. Combined, they had total assets of $67 million, total deposits of $58.1 million, and total loans and discounts of $33.6 million, as of December 31, 1970. The combined deposits of these banks as of December 31, 1971 ($71.1 million (*id.* at 40a)) are exceeded by only five banks in the Atlanta area, including C&S (*ibid.*), and "Sandy Springs and Chamblee are, alone, the tenth and eleventh largest banking organizations in the Atlanta area, respectively" (*ibid.*).

Tucker. Another five-percent bank, Citizens and Southern Bank of Tucker ("Tucker Bank"), is a defendant in this suit. Tucker Bank, a state-chartered bank located northeast of Atlanta in Tucker, in DeKalb County, and chartered as Bank of Tucker in 1919, was in existence long before its association with C&S in 1965. In that year C&S Holding purchased five percent of the stock of Bank of Tucker, which then adopted its present name. It has two offices and had assets of $26.5 million, deposits of $23 million, and loans and discounts of $14.8 million as of December 31, 1970 (J.S. App. 5a).

Since 1965 Tucker Bank, like the other five-percent defendant banks, has operated as a *de facto* branch in the C&S System (see DX 267, p. 2; App. E-462). It is involved only in the Sherman Act aspect of this case, because the Federal Deposit Insurance Corporation ("FDIC") disapproved C&S's application to acquire it, although its relationship with C&S as a *de facto* branch continues despite criticism by FDIC.[1]

B. GEORGIA BANKING LAW AND C&S'S HISTORY IN THE ATLANTA AREA

Prior to 1927 Georgia permitted statewide branching, and C&S National, whose home office is in Savannah, established three branches in Atlanta. Georgia prohibited branching in 1927, but in 1929 it amended

[1] The FDIC characterized the relationship between C&S and Tucker Bank as being "anticompetitive in its origins" but assumed that it could be terminated only by "compulsory process" (GX 33D, pp. 2-3; App. E-8—E-9).

the branching law to permit banks to open branches in the cities in which their home offices were located (J.S. App. 7a–10a). This amendment, which remained in effect until 1960, precluded C&S National from opening additional branches in Atlanta.

Until 1956, however, Georgia law did not prohibit bank holding companies. Between 1946 and 1954, C&S Holding, formed in 1927, acquired the stock of two banks in the Atlanta area (C&S East Point and C&S DeKalb) and C&S formed a third bank (C&S Emory), virtually all of whose stock is owned by C&S Holding (*id.* at 9a–10a).

Enacted in 1956, the Georgia Bank Holding Company Act, Ga. L. 1956, pp. 309–312, prohibited any holding company from acquiring more than fifteen percent of a bank's stock, and a 1960 amendment further limited such ownership to five percent. Ga. Code Ann. 13–207(a) (J.S. App. 8a). See also p. 20, *infra.*

In 1965, Georgia authorized branching within the limits of any city in which a bank had an office; in 1970 it authorized branching, beginning in 1971, in any county in which a bank has an office. Ga. Code Ann. 13–203(c) (Cum. Supp. 1972). The city of Atlanta covers parts of Fulton and DeKalb counties and prior to 1971 C&S had branches in Atlanta located in both counties. The 1971 amendment of Georgia's branching law thus permitted C&S, for the first time, to open branches in Fulton and DeKalb Counties beyond Atlanta's city limits, and it has done so (J.S. App. 8a, 10a). The 1971 amendment also made the

five acquisitions challenged here possible under state law.

C. C&S'S RELATIONSHIPS WITH THE FIVE-PERCENT DEFENDANT BANKS

In seeking regulatory approval for its acquisitions of the five-percent defendant banks, and in defending this lawsuit, C&S has relied heavily on the existing relationships between it and those banks. It has characterized the five-percent defendant banks as *de facto* branches of C&S (DX 266, pp. 2-3; App. E-340—E-341; DX 267, pp. 2-3; App. E-462—E-463), and has asserted that the operation of these banks as though they are in fact branches of C&S has been achieved by means of "voluntary control" (see p. 4, *supra*). The existence of these relationships, C&S maintains, precludes a finding that the acquisitions will have anticompetitive effects.

The five-percent defendant banks are in fact operated as C&S branches. Appellees stated in their post-trial brief (p. 26) that the five banks it proposes to acquire (termed "correspondent associates" by C&S) "are operated in all significant respects as C&S branches. There is an abundance of testimony showing that there are no significant differences between the C&S correspondent associate banks and C&S National's branches."

This *de facto* branch relationship is the product of the five-percent defendant banks' willingness to be "controlled" by C&S, *i.e.*, the relationship exists because of an understanding or agreement between the parties. As appellees explained below: "The existing relationships were and are sought, valued, and main-

tained by the 5% banks. * * * [C&S has] responded by offering counsel, assistance and advice. * * * [T]hese relationships have resulted in noncompetition between and among defendant banks. The relationships have endured and persisted * * * with the clear and explicit understanding of all parties" (Memorandum Regarding Effect, *supra*, p. 5.) Although the officers and directors of the five-percent defendant banks have the ultimate legal authority to make decisions respecting their banks, appellees pointed out that "the shorthand description of the relationships claims only 'voluntary control' " (*id.* at 5).

The *de facto* branch relationship includes joint determination of competitive strategy by C&S and its *de facto* branches, particularly mutual determinations concerning rates and prices. This was accomplished by exchanges of competitive information, which resulted in such non-competitive uniformity that appellees stated in their post-trial brief (p. 40) "that the defendant banks represent, in effect, a single economic enterprise." For example, memoranda C&S circulated to the five percent defendant banks stated:

> Let's * * * get the rates [on loans] up where they belong [*i.e.,* "rates suggested by the new rate chart"]. [GX 116; App. E–133.]
>
> There could be exceptions to these guidelines [on residential construction loan rates] and if so, they should be cleared through [C&S] Branch Supervision.
>
> In the case of commercial construction loans Please check with xxx [C+S] Real Estate De-partment for the going rate. [GX 120; App. E–139.[2]]

Either the five-percent bank or C&S is free to terminate the existing relationship and to resume or

establish "*de facto*" independence, with or without an ordinary correspondent relationship, as was in fact done by Citizens and Southern Bank of Stone Mountain ("Stone Mountain").

Stone Mountain was organized in 1957 with some assistance by C&S, albeit not as much as in the cases of the other five-percent defendant banks whose organization it assisted (App. 357–361, 368–369, 373, 395–397, 414, 420–423). C&S Holding acquired five percent of Stone Mountain's stock in 1959, and in 1966 the bank changed its name to Citizens and Southern Bank of Stone Mountain, thus becoming a "correspondent associate" of C&S like the five-percent defendant banks.

---

[2] Such memoranda also stated:

> The discount rate increased from 4¾% to 5% effective July 19th. The commercial loan rate chart distributed to you last week carried the old rate of 4¾%. * * * [T]his rate chart reflects minimum rates * * *. [GX 115; App. E–132.]
>
> Let's plan to start keeping our drive-in windows open until four o'clock at every location just as quickly as this can be arranged. [GX 123; App. E–142.]

Another example concerns the establishment of uniform checking account charges. In February 1970, C&S National notified the five-percent banks of its intent to raise its service charges on regular checking accounts in Atlanta, with no date being then specified (GX 188; App. E–240). At that time some of the five-percent banks had service charge schedules different from (usually lower than) C&S National's (DX 302, pp. 2–8; App. E–842—E–848). But on April 1, 1970, every defendant bank adopted identical charges for both regular and special checking accounts (*ibid.*).

See also GX 107–114, 117–119, 121, 122, 125–128, 134, 136, 138–140, 142, 148, 151, 153, 189, 190; App. E–121—E–131, E–134—E–138, E–140, E–141, E–145—E–152, E–155, E–156—E–160, E–161, E–162—E–163, E–164, E–165, E–241, E–242.

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That bank, however, later declined C&S's offer to acquire it, and has since become completely independent of C&S's influence and no longer uses the C&S name (App. 151–152, 154, 156–157, 165–166, 176–177, 357–359, 369, 395–396, 444). Appellees asserted in their post-trial brief (p. 40) that the difference between C&S's relationship with Stone Mountain and its relationship with the five-percent defendant banks was chiefly one of "attitudes;" Stone Mountain's officials did not permit C&S to manage their bank.[3]

D. THE ATLANTA BANKING MARKETS

The Clayton Act count of the complaint alleged that the proposed acquisitions may substantially lessen competition and would increase concentration (a) in the Atlanta area, consisting of DeKalb and Fulton Counties, in which the City of Atlanta lies; (b) in DeKalb and Fulton Counties separately; and (c) in north Fulton County. Within each of the government's proposed markets, which the district court accepted for "purposes of discussion" (J.S. App. 30a–31a), commercial banking is highly concentrated. For example, in the Atlanta area, the top two banks had 53.2 percent of total deposits and the top four had 84.2 percent. The acquisitions would increase these levels of concentration by two percent, would raise

[3] Mills B. Lane, former president of C&S National and C&S Holding (~~Tr.~~ App. 341, 343–344), was asked to compare C&S's relationship with Stone Mountain and its "voluntary control" of the defendant five-percent banks. He testified that they are as "[d]ifferent as day and night. * * * [Stone Mountain's directors] wanted to * * * [and did] tell him [Stone Mountain's president] what to do" (~~Tr.~~ App. 359–360; see also ~~Tr.~~ App 396–397).

C&S's share as market leader from 30 to 32 percent and would reduce the total number of banking organizations in the Atlanta area market by one sixth, from 31 to 26. Similar effects would occur in each of the other markets.[4]

E. THE ACQUISITION PROPOSAL, COMPETITIVE REPORTS, AND THE FEDERAL DEPOSIT INSURANCE CORPORATION'S DECISION

In 1970 C&S applied to the FDIC, pursuant to 12 U.S.C. 1828(c), for approval of its proposed acquisitions of the assets and assumptions of the liabilities of the six "five percent" banks described above (DX 266; App. E-337—E-459; DX 267; App. E-460—E-571B).[5] The applications asserted that the banks to be acquired are "virtually operated and directed as *de facto* branches in the C&S system," that their "[s]tockholders, customers and competitors have recognized that fact," that the proposed acquisitions "can produce no anti-competitive results * * * since no change is contemplated—except as to form," and that, since no competition exists between C&S and the five-percent banks, no competition could be eliminated by the proposed acquisitions (DX 266, pp. 2-3; App. E-340—E-341; DX 267, pp. 2-3; App. E-462—E-463).

[4] Tables setting forth concentration levels and the effect of the acquisitions upon them in each market are contained in the district court's findings (J.S. App. 31a-40a). See also p. 53, *infra*, n. 34.

[5] The applications actually were filed by two C&S subsidiaries: C&S East Point proposed to acquire Sandy Springs Bank and North Fulton Bank, and C&S Emory proposed to acquire Chamblee Bank, Park National Bank, South DeKalb Bank and Tucker Bank. Since a substantial majority of the

Pursuant to 12 U.S.C. 1828(c)(4), the Department of Justice, the Board of Governors of the Federal Reserve System, and the Comptroller of the Currency submitted competitive reports to the FDIC concerning the proposed acquisitions (GX 38; App. E-38—E-56; DX 318; App. E-1822—E-1825; DX 317; App. E-1816—E-1821). The Board of Governors and the Comptroller reported that the acquisitions would not have anticompetitive effects. The Department, after initially also so reporting as to all but Tucker Bank,[6] concluded after further investigation that all six proposed acquisitions "would have a significantly adverse effect on competition" (GX 38, p. 17; App. E-54).[7]

two acquiring subsidiaries' stock is owned by C&S Holding, the proposed acquisitions are in substance acquisitions by C&S and have been consistently treated as such (J.S. App. 6a). As each of the acquiring banks is a "nonmember [of the Federal Reserve System] insured bank," the FDIC is responsible for approving the acquisitions in the first instance. 12 U.S.C. 1828(c)(2)(C).

[6] The Department had initially reported that the acquisition by C&S of the five banks C&S had assisted in organizing would have no adverse effect on competition because they had always been "affiliated" with C&S, but that the acquisition of Tucker Bank would injure competition because it had previously been independent. The initial reports were based on the erroneous assumption that, from the time they were organized, C&S completely controlled the "affiliated" banks it sought to acquire and that the latter banks had never been independent competitors. A subsequent field investigation, prompted by information received after the initial reports were submitted, revealed that the assumption of complete control was not correct (GX 38, pp. 3-4; App. E-40—E-41).

[7] The only issue before the FDIC was whether to approve the proposed acquisitions; it was not called upon to determine whether the existing arrangements between C&S and the five-percent banks violate Section 1 of the Sherman Act.

On October 4, 1971, the FDIC approved the acquisition by C&S of the five banks it had assisted in organizing (GX 33B; App. E-1—E-4; GX 33C; App. E-5—E-6), concluding that they do not and never did compete with each other or with C&S (GX 33B, p. 2; App. E-2; GX 33C, p. 2; App. E-6). The FDIC disapproved, however, the acquisition of Tucker Bank (GX 33D; App. E-7—E-9). The FDIC found that, because of the "close * * * working relationship" between the two banks, C&S's acquisition of Tucker Bank would not eliminate any existing competition and that voluntary disaffiliation is unlikely. Nevertheless, it denied approval because "the present affiliation was anticompetitive in its origins and should not now be ratified by the * * * [FDIC's] approval" of the merger (*id.* at 3). It also suggested that disaffiliation depends on "compulsory process to sever the C&S relationship with this bank, rather than the denial of the [acquisition] application * * *" (*id.* at 2).

F. THE DISTRICT COURT'S DECISION

On November 2, 1971, within the 30-day period prescribed for such suits (12 U.S.C. 1828(c)(6), (7)), the United States filed this action. The complaint alleged that C&S's consummation of the five acquisitions approved by the FDIC [8] would violate Section 7 of the Clayton Act, and that C&S and the six five-percent defendant banks (including Tucker Bank) had entered into a combination pursuant to which they

[8] The FDIC did not exercise its statutory right to intervene as a party defendant, 12 U.S.C. 1828(c)(7)(D).

have jointly determined the competitive strategy of each bank in violation of Section 1 of the Sherman Act (App. 9–23). The complaint sought injunctive relief to prohibit the acquisitions and to terminate the Section 1 violations. Pursuant to 12 U.S.C. 1828(c)(7)(A), the commencement of the action automatically stayed the effectiveness of the FDIC's approval and hence, consummation of the acquisitions.[9]

Following a trial on the merits, the district court entered judgment for the appellees on both the Section 1 and Section 7 claims.

1. *The Sherman Act claims.* The district court held that the Board of Governors of the Federal Reserve System had "exclusive primary jurisdiction" under the Bank Holding Company Act of 1956, 70 Stat. 133, as amended, 12 U.S.C. 1841, *et seq.,* over all questions presented under the Sherman Act concerning the legality of the relationship between C&S and the six five-percent banks. Citing *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.,* 379 U.S. 411, the court ruled that the doctrine of "exclusive primary jurisdiction is applicable * * * not only to questions of organization, but also to questions of operation of banks by bank holding companies" (J.S. App. 26a).

Alternatively, the court held that no violation of Section 1 had been established. Apparently accepting

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[9] The district court denied appellees' motions to lift the stay prior to trial and after trial. Mr. Justice Powell denied appellees' motion to lift the stay after the appeal was docketed in this Court.

the premise that the five-percent defendant banks are legally-independent banking institutions, the court, in its analysis of the Section 1 claims, made no finding as to initial responsibility for organization of the five banks in whose creation C&S had participated (see *id.* at 10a). It noted, however, that "C&S's involvement was prompted by hope that it would be the forerunner of much larger interests in the future. It is also clear that such initial C&S participation effectively precluded *ab initio* any real competition between the C&S System and the five percent defendant banks" (*id.* at 11a.). The court also found that C&S's advice and suggestions with respect to rates, hours of operation, types of loans to discourage, and minimum loan rates were generally followed, but concluded that these activities do not amount to collusive price fixing or market division, and hence are not *per se* violations of Section 1 (*id.* at 23a–25a).

Applying the "rule of reason," the court found no adverse effects upon competition nor any significant difference from an ordinary correspondent relationship between banks (*id.* at 29a):

> There is no evidence of record to conclude that the utilization by the five percent defendant banks of the services or information received by them from C&S National or C&S Holding was a result of any tacit or explicit combinations rather than the natural deference of the recipient to information from one with greater expertise or better sources.

In sum, the court concluded that the difference between the challenged arrangement and the usual rela-

tionship between correspondent banks was "merely one of degree" (*id.* at 28a).

2. *The Clayton Act claims.* By contrast, the court's rejection of the Clayton Act claims rested upon the contrary proposition that the relationship between C&S and each five-percent bank was unlike "the normal correspondent banking relationship" in that it was "much closer" (J.S. App. 49a), so that "there is no presently existing substantial competition between the five percent defendant banks and C&S National, or *inter sese,* or with third parties, which would be affected by the proposed merger" (*id.* at 66a).

The court found that C&S had been intimately involved in all aspects of the banks' establishment; that the chartering agencies knew that each bank would be affiliated with a large bank and relied on this fact in granting a charter; and that C&S officials had stock interests in excess of five percent.[10] The court found that C&S had: furnished the president

[10] The court appears to have concluded that C&S's relationship with the five-percent banks was the type endorsed by the government in its jurisdictional statement in *United States* v. *Marine Bancorp.*, No. 73-38, decided June 26, 1974 (J.S. App. 22a-23a, 29a). It also concluded that in 1968 the Department of Justice had acquiesced in the relationship between C&S and the five-percent banks by failing to challenge it after participating in an understanding reached during an investigation by the Federal Reserve Board staff to determine whether C&S had violated the Bank Holding Company Act of 1956 (J.S. App. 27a). The understanding provided that C&S would not be deemed to control a majority of the Board of Directors of a five-percent bank by reason of its furnishing a principal operating officer, that officer's purchase of additional shares, or its placing of one or two directors on the bank's board, if they were not a majority (see J.S. App. 18a-19a).

and other managing officials of each bank; selected directors; arranged for the banks to use the C&S name and logo to increase their public identification with C&S; provided accounting services; set up the same credit administration and controls as for C&S branches; provided for regular credit meetings with C&S officers and affiliates; furnished the five-percent banks with C&S guides and manuals; provided an advisory director to meet with each bank's board of directors; supervised their operations through C&S's branch supervision department; and arranged for customer services to be handled as if each bank were a branch of C&S (*id.* at 42a–55a).

The court found that this relationship "is principally a matter of such intangible factors as the intentions of the principals, and that stock ownership is merely one manifestation along with various implementing operating procedures" (*id.* at 65a), so that "stock ownership is not the most important cement, nor is [it] even necessary to the maintenance of these strong relationships * * *" (*id.* at 55a).

Citing *United States* v. *Trans Texas Bancorp.*, CCH 1972 Trade Cases ¶ 74,257 (W.D. Tex.), affirmed, 412 U.S. 946, the court held that the absence of substantial competition between parties to a proposed horizontal merger precludes a finding that the merger may substantially lessen competition. In the court's view, "it makes no difference whether this absence of competition results from a legally effective stock ownership control, as in *Trans Texas*, or from the more intangible factors present here. It is the absence of

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competition which is the crucial factor in a Section 7 case, not the underlying factors producing that situation" (J.S. App. 66a). On this basis it concluded that none of the acquisitions would violate Section 7.

3. *The Georgia Supreme Court's decisions concerning the invalidity of C&S's relationship with five-percent banks under state law.*

Prior to the decision of the district court, the validity, under state law, of the relationship between C&S and a number of five-percent banks (including C&S South DeKalb) was challenged in the Georgia courts. The Supreme Court of Georgia held that C&S had exceeded the five-percent stock limitation in Georgia law, and that C&S was indirectly controlling more than five percent of the stock because of "the action of certain * * * [C&S] officers and directors in acquiring such stock, selling it to selected individuals and trusts, and in treating such banks as branch banks of Citizens and Southern." *Citizens & So. Nat'l Bank* v. *Independent Bankers Ass'n of Ga., Inc.*, 202 S.E. 2d 78, 80. See also *Independent Bankers Ass'n of Ga., Inc.* v. *Dunn*, 230 Ga. 345, 197 S.E. 2d 129. After the district court's decision in this case, the Georgia Commissioner of Banking and Finance, on remand from the Georgia Supreme Court, ordered C&S to take various steps to reduce its connections with and involvement in the affairs of all of its five-percent banks (J.S. App. 75a–87a).[11]

[11] That order provided, among other things, that C&S must terminate supervision of all five-percent banks beyond that which is available to any other bank wishing to enter a correspondent relationship; that no C&S officer or director may serve as a director or officer of a five-percent bank; that cer-

Viewing as only "technical" C&S's violations of the state banking laws, the district court considered those violations irrelevant to its assessment of the anticompetitive nature of the relationship between C&S and the five-percent banks (J.S. App. 66a–68a). In addition, after the order had been issued by the Georgia Commissioner of Banking and Finance, the district court amended its opinion *nunc pro tunc* to state that the order had no effect on the court's decision (J.S. App. 70a–72a).

SUMMARY OF ARGUMENT

This case involves the applicability of Section 1 of the Sherman Act to the relationships between C&S, the largest banking organization in the Atlanta area, and six smaller banks operating there. Under that relationship, those banks, in which C&S could legally own no more than a five-percent stock interest, are operated as though they are branches of C&S. The case also involves the applicability of Section 7 of the Clayton Act to the proposed acquisition of five of those banks by C&S.

1. Appellees argue that the banks should be viewed as if they are parent and subsidiaries in a single economic entity, and that the acquisitions would be little

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tain C&S officers and directors who acquired stock in the five-percent banks under certain conditions must divest that stock; that C&S Holding must divest its stock in the five-percent banks if that stock, together with stock held by C&S National shareholders in the five-percent bank, exceeds five-percent of the stock of the latter bank; and that signs, advertising and similar written materials disseminated by a five-percent bank must distinguish that bank from C&S, if the C&S logo is used.

more than a formal reorganization of that situation, which would eliminate no competition. We contend that the *de facto* branch arrangements, which comprehend the joint determination of the smaller banks' competitive policies, are themselves illegal combinations or agreements which restrain competition between C&S and the five-percent banks in violation of Section 1 of the Sherman Act and which should therefore be declared invalid and enjoined. We also contend that the permanent, formal union of these banks by acquisition would violate Section 7 of the Clayton Act because, judged by traditional structural criteria, the acquisitions would give C&S control of an undue percentage share of concentrated markets and would significantly increase concentration in those markets, and because the previous elimination of competition among the banks in violation of the Sherman Act cannot constitute a defense under Section 7 of the Clayton Act.

2. In dismissing the Sherman Act claims on the ground that no agreements in restraint of trade had been proved, the court failed to give effect to this Court's decisions, such as *United States* v. *Container Corp. of America*, 393 U.S. 333, and *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, respecting the elements of agreement under the Sherman Act. The court also erroneously relied on *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co., supra,* and misapprehended the structure and purpose of the Bank Holding Company Act of 1956, 70 Stat. 133, as amended, 12 U.S.C. 1841, *et seq.*, in ruling, alternatively, that that Act gave the Federal Reserve Board "exclusive

primary jurisdiction" to consider the Sherman Act claims in this case.

3. Appellees claim that the five-percent banks, although independent entities, should be viewed as its branches, for purposes of Section 7, because they have voluntarily become its subsidiaries *de facto*. Appellees concede that, unlike a subsidiary or *de jure* branch bank, it is possible that the five-percent defendant banks would disengage from the C&S System (as Stone Mountain did) and become independent competitive factors. In defending the acquisitions they contend that that possibility is unlikely to occur because of the close existing relationships and elaborate linkages between C&S and the five-percent banks. In short, their defense to the Clayton Act claim is based upon the same arrangements challenged as violating Section 1 of the Sherman Act.

Such a defense is without merit. The purposes of both the Sherman Act and the Clayton Act would be disserved if firms in a market knew that if their anticompetitive agreements with other firms succeeded in eliminating competition they would then be able, regardless of their market shares, to merge and transmute their cartel into a permanent union. Accordingly, by reasoning that the acquisitions could not substantially lessen competition because the parties had already voluntarily eliminated it in their on-going business relations, the district court improperly rejected well-established principles governing the legality, under Section 7, of acquisitions or mergers involving competitive entities in the same market. While this Court has indicated that a *prima facie* case based on

market structure data may in some circumstances be rebutted by evidence of pro-competitive market facts or developments (see *United States* v. *Marine Bancorp.*, No. 73-38, decided June 26, 1974, slip op. 27-28; *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 497-498), here the court erroneously relied upon the absence of competitive behavior resulting from a prior violation of Section 1 to overcome the case made by the government based on market shares.

ARGUMENT

I

THE ARRANGEMENT BETWEEN C&S AND THE LEGALLY-INDEPENDENT FIVE-PERCENT BANKS, WHEREBY THEY OPERATED AS "DE FACTO" BRANCHES OF C&S, VIOLATES SECTION 1 OF THE SHERMAN ACT

A. THE ARRANGEMENT IS AN AGREEMENT UNDER SECTION 1 OF THE SHERMAN ACT

The record, appellees' own submissions before the FDIC and in the district court, and the district court's findings, all establish that C&S and the five-percent defendant banks are operating pursuant to agreements or understandings that violate Section 1 of the Sherman Act.

1. The five-percent banks are and must be treated as independent competitive entities

It is undisputed that each five-percent defendant bank (including Tucker Bank) is a legally and factually independent decision-making entity, subject to control only by, and in the interests of, all of its own shareholders. C&S owns only a five-percent stock interest in these banks and, under Georgia law, cannot

directly or indirectly own or control a greater percentage. C&S therefore lacks the power legally to require the banks to conform their competitive behavior to its wishes or to prevent the banks from competing in a manner that might be inconsistent with C&S's interest.

Unlike the situation in *United States* v. *Trans Texas Bancorp., supra* (discussed at pp. 54–55, *infra*), shareholders common to C&S and the five-percent defendant banks did not have the power to control the competitive behavior both of C&S and any of the five-percent defendant banks, either through majority stock holdings or its equivalent. The stock of the five-percent defendant banks is owned by "a large number of shareholders * * * and no single shareholder owns a significant number of the shares of any such bank" (J.S. App. 43a). These shareholders have no legal or other obligation to act as agents of C&S in setting the policies of their banks.[12]

C&S has always denied having the power to control the competitive behavior of the five-percent defendant banks, a position that is consistent with the banks' legal status as independent competitive entities. Thus, C&S National's president advised the Federal Reserve Board's staff in 1968 that C&S influenced, but did not, and indeed could not, control the five-percent defend-

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[12] Substantial amounts of the stock of each five-percent bank are held by persons who are presently officers or employees of C&S or other banks in the C&S System, spouses of such persons, or customers of banks in the C&S System (J.S. App. 43a–44a). None of such connections with C&S is permanent and there is no way of knowing how long they will continue. C&S cannot insure, and the district court should not have assumed, their indefinite existence.

ant banks, which were always free to pursue their own interests.[13]

The record shows that each five-percent defendant bank has an independent board of directors whose members are not officers, employees or directors of C&S or of other banks (see Plaintiff's Proposed Findings of Fact and Conclusions of Law, ¶ 1.23, p. 10; Defendants' Objections to Plaintiff's Proposed Findings of Fact, p. 11). The directors and chief officers who testified on the subject all denied that C&S can or does dictate policies or practices to them, or control their actions.[14] They say they follow C&S's advice only when they believe it is in the best interest of their banks[15]—which, as the district court found (J.S. App. 24a), is in the great majority of instances

[13] In the investigation conducted by the Federal Reserve Board's staff (described more fully at pp. 48–49, *infra*), Mills B. Lane, Jr., President of C&S National, stated that "[t]he five percent investment followed the identical philosophy of my father of *influencing by not controlling* the correspondent bank relationship" and that "I look on the use of the name Citizens and Southern [by the five-percent banks] as identity with the strong institution, *not with control* * * *" (GX 177, pp. 8–11; App. E-224—E-227). When asked what assurance C&S had that a five-percent bank using the C&S name would not engage in activities that would reflect adversely on the name, Lane acknowledged that "[t]hat is the gamble we have taken. The only misgiving I ever had about *our lack of control* is the use of this name" (*id.* at 15; emphasis supplied).

[14] Cook Dep., pp. 21–22; App. 771–772; Lane Dep., p. 23; App. 824–825; Connelly Dep., p. 17; App. 751; W. Berry Dep., p. 91; App. 732; Harris Dep., pp. 27–28; App. 792–793; Hazelrig Dep., pp. 16–17; App. 802–803; see App. 457–458.

[15] Cook Dep., pp. 21–22; App. 771–772; Lane Dep., p. 58; App. 846; Connelly Dep., p. 28; App. 758; W. Berry Dep., p. 90; App. 731–732; Harris Dep., pp. 21–22; App. 789–790; Hazelrig Dep., pp. 26–28; App. 809–810.

(see pp. 9–12, *supra*). As stated by the regional administrator of national banks, who testified as a defense witness, while the five-percent defendant banks "are under the aegis of the C&S National; yes, I must say that they are independent organizations" (App. 533).

These "independent organizations" nevertheless operate as C&S's branches—as though they are merely parts of a single economic enterprise—as appellees have consistently asserted and as the district court found (J.S. App. 42a–55a). The "relationship" between C&S and each of the five-percent defendant banks is based on their mutual agreement or understanding that the latter banks will "voluntarily" submit to C&S's direction and behave in all significant respects as if they are branches of C&S. The district court found this arrangement so pervasive—extending even to supervision of the banks by C&S's own branch department—that it concluded that the five-percent defendant banks were not significant independent competitive entities [16] (J.S. App. 66a). Although the five-percent defendant banks have the legal capacity and power to act as independent, competing entities, the district court found that, as a consequence of their relationship with C&S, "there is not presently existing substantial competition between the five-per-

[16] A C&S executive formerly in charge of branch supervision (App. 386), in stating his view of the "relationship" between C&S and the five-percent defendant banks C&S proposes to acquire, testified that "[t]here's no difference than between our relationship with the [C&S] branches and the five percenters because what we had to offer was solicited, invited, wanted, received, and our recommendations were readily accepted" (App. 397–398).

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cent defendant banks and C&S National * * * " (J.S. App. 66a).

Implicit in the district court's acceptance of appellees' claim that the five-percent banks should be treated, for Sherman Act purposes, as if they were *de facto* branches of C&S, is the assumption that the separate and independent corporate identities of C&S and those banks should be disregarded and that they should all be treated as integral parts of a single business entity. Although courts sometimes "pierce the corporate veil" by ignoring formal distinctions between a corporation and its shareholders, (*e.g.*, between a parent corporation and its wholly-owned subsidiary), that is almost invariably done in order to impose liability on entities other than the corporation that took challenged action. It is quite another matter, however, to ignore the separate corporate identities of independent firms and permit them to evade a liability on the claim that they are a single entity. See generally Berle, *The Theory of Enterprise Entity*, 47 Colum. L. Rev. 343 (1947).[17]

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[17] The results in cases raising the question whether corporate form should be disregarded in order to treat separate organizations as a single entity vary according to the context in which the question is raised. Many involve claims against a parent corporation by creditors of a subsidiary or by persons tortiously injured by it. The issue in such cases is whether the corporate form insulates the parent from its subsidiary's alleged liability. See, *e.g.*, *Anderson* v. *Abbott*, 321 U.S. 349, 361–363; *Berkey* v. *Third Ave. Ry.*, 244 N.Y. 84, 155 N.E. 58. Other cases involve priority relationships in corporate reorganizations between stockholders of the parent-controlled subsidiary. *E.g.*, *Taylor* v. *Standard Gas & Elec. Co.*, 306 U.S. 307, 322. See also *Pepper* v. *Litton*, 308 U.S. 295, 306–312; *Consolidated Rock Prods. Co.* v. *Du Bois*, 312 U.S. 510, 522–524. Still others involve the implementation of statutory policies. For

To the contrary, as this Court has stated, "[o]ne who has created a corporate arrangement, chosen as

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example, separate corporate form may be disregarded for purposes of the labor laws if the facts show that several companies represented themselves to be one, the economic enterprise is in fact operated as a single entity, the separate corporate forms are simply paper arrangements, and other factors justify unitary treatment. See, *e.g.*, *National Labor Relations Board* v. *Deena Artware, Inc.*, 361 U.S. 398, 402–404. The contrary is true here. See also Stevens, *Corporations* §§ 17, 18 (2d ed. 1949); Douglas & Shanks, *Insulation from Liability through Subsidiary Corporations*, 39 Yale L.J. 193 (1929). The issue frequently turns on whether the subsidiary is the "mere instrumentality" of its parent. This will depend on factors defining the parent's degree of control over the subsidiary, as enumerated in *Steven* v. *Roscoe Turner Aeronautical Corp.*, 324 F. 2d 157, 160–161 (C.A. 7), quoting Powell, *Parent and Subsidiary Corporations* 94 (1931):

"(a) The parent corporation owns all or most of the capital stock of the subsidiary.

"(b) The parent and subsidiary corporations have common directors or officers.

"(c) The parent corporation finances the subsidiary.

"(d) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation.

"(e) The subsidiary has grossly inadequate capital.

"(f) The parent corporation pays the salaries and other expenses or losses of the subsidiary.

"(g) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation.

"(h) In the papers of the parent corporation or in the statements of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own.

"(i) The parent corporation uses the property of the subsidiary as its own.

"(j) the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest.

a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid the obligations which the statute lays upon it for the protection of the public." *Schenley Distillers Corp.* v. *United States,* 326 U.S. 432, 437. The statutes involved here are aimed at preserving competition, and "[t]he corporate interrelationships of the conspirators * * * are not determinative of the applicability of the Sherman Act." *United States* v. *Yellow Cab Co.,* 332 U.S. 218, 227. In determining whether, for purposes of that Act, corporations are independent entities or mere corporate shells or divisions of the same entity, this Court has looked to the fundamental policies being vindicated as well as the indicia of corporate independence. See, *e.g., Northern Secs. Co.* v. *United States,* 193 U.S. 197, 325–328, 345–347, 355–359, 362–363; *United States* v. *Yellow Cab Co., supra,* 332 U.S. at 227–228; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 215; *Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, 598; *Perma Life Mufflers, Inc.* v. *International Parts Corp.,* 392 U.S. 134, 141–142. Under that approach, and on the record in this case, the five-percent banks are independent entities, any one of which, together with C&S, constituted the plurality of persons necessary to establish a Sherman Act "agreement." See, *e.g., Nelson Radio & Supply Co.* v. *Motorola, Inc.,* 200 F. 2d 911, 914 (C.A. 5).

In any event, the record here does not justify treating appellees as a single economic entity. Thus, ap-

"(k) The formal legal requirements of the subsidiary are not observed."

pellees concede that each of the five-percent banks is a separately-chartered and independent entity and that their directors owe fiduciary obligations to their respective shareholders and not to C&S. C&S denies that it has power to elect their directors or control their management at all; those banks, it claims, follow its suggestions only "voluntarily." It has no common officer with any of them. C&S has never represented that it is legally liable on the obligations of those banks, and it would no doubt be the first to protest if a creditor of one of the five-percent banks sought to hold C&S liable for the debt of its *"de facto"* subsidiary.

The total assets of the five-percent banks are not shown in C&S's balance sheet as an asset of C&S or treated as part of C&S's bank reserves, as would be done with subsidiaries. State and federal bank regulatory agencies do not view those assets as the property of C&S.[18] If one of those banks failed, C&S would presumably be subject to liability as a shareholder only to the extent of its five-percent interest. Cf. *And-*

[18] Sound accounting practice, which the Federal Reserve Board and other bank regulatory agencies follow, ordinarily requires that all wholly-owned subsidiaries should be included in consolidated financial statements, but that "all companies in which ownership is below 50% should, ordinarily, be excluded." Wixon, Kell, Bedford, *Accountants Handbooks* § 23.3 (5th ed. 1970). The Securities and Exchange Commission permits bank holding companies and their direct and indirect subsidiaries to file consolidated statements (17 C.F.R. 210.4-07), but prohibits consolidation of "any subsidiary which is not majority owned" (*i.e.*, whose parent owns less than 50 percent of outstanding stock). 17 C.F.R. 210.1-02(1), 210.4-02(a)(1). The Internal Revenue Code, which permits affiliated groups of corporations to file consolidated returns (26 U.S.C. 1501), requires 80 percent ownership. 26 U.S.C. 1504.

erson v. *Abbott,* 321 U.S. 349, 368–369. Finally, the claim that the banks are *de facto* subsidiaries of C&S conflicts directly with the provisions and policy of Georgia law as authoritatively interpreted by the Georgia courts (see Statement, *supra,* p. 20.).

The sole basis for C&S's claim that the banks are its "*de facto*" branches is that they have submitted to its direction and, with its agreement, hold themselves out and are operated as part of its system. But these are the very ingredients of the offense with which appellees are charged. Thus, the combination of factors that might, for some purposes, justify disregarding the separate corporate identities of the five-percent banks and the C&S System are not present here.

2. *The challenged arrangement constitutes an agreement to eliminate price and service competition between C&S and the five-percent banks*

In dismissing the Sherman Act claims on the merits, the district court did not disagree that the five-percent defendant banks are legally independent entities. It found that C&S routinely furnishes them information and advice regarding past, present and future competitive policies, methods of operation, and such specific matters as rates, hours of operation, and types of loans to be discouraged (J.S. App. 24a); that the five-percent defendant banks generally followed C&S's "advice and suggestions" (*ibid.*); and that the overall relationship between C&S and the five percent defendant banks, which was designed to and did combine these independent entities into a single economic enterprise, has eliminated competition between C&S and each of them (*id.* at 66a).

Notwithstanding these findings, the district court held that C&S's furnishing of pricing information to the five-percent defendant banks—which they generally followed—"do[es] not amount to collusive price fixing" (*id.* at 24a). According to the court, it was not "a result of any tacit or explicit combinations * * *" (*id.* at 29a), so that these practices did not *per se* violate the Sherman Act and did not unreasonably restrain trade because they do not adversely affect customers or competitors (*id.* at 27a). In so ruling, however, the district court misapplied this Court's decisions establishing standards for proof of an agreement under the Sherman Act.[19]

The entire relationship and course of conduct between C&S and the five-percent defendant banks reflects in each case a mutual understanding that the latter banks would act jointly and interdependently with C&S as its branches. There is no other explanation for: their acquiescence in a relationship that permitted an advisory C&S director to sit with their boards of directors; C&S's branch department's supervision of them and review of their goals, objectives and performance (*id.* at 52a–53a); their successful effort to identify themselves to the public through C&S's name and logo as merely interchangeable parts of the C&S System; C&S's supplying them with the

[19] *Interstate Circuit, Inc* v. *United States*, 306 U.S. 208, 226–227; *United States* v. *Masonite Corp.*, 316 U.S. 265, 275–276; *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 722–723; *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 193–195; *United States* v. *General Motors Corp.*, 384 U.S. 127, 141–145; *United States* v. *Container Corp. of America*, 393 U.S. 333, 335.

same guides, manuals, and pricing information it supplies to its *de jure* branches; or their adoption of uniform service charges in 1970 (see p. 11, *supra*, n. 2). The arrangement eliminated, or precluded the development of, any substantial competition among the appellee banks (J.S. App. 66a), and constituted a system of price fixing designed to achieve uniformity among them.

Thus, this case involves not merely the exchange of past price information which affects current pricing practices, as in *United States* v. *Container Corp. of America, supra.*[20] It shows a mutual understanding to fix actual current prices, which constitutes a classic *per se* offense. *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221–226, n. 59; *United States* v. *Parke, Davis & Co.,* 362 U.S. 29, 47.

Two independent business entities cannot achieve a relationship by which one voluntarily undertakes to operate as a "branch" of the other, and jointly to determine prices, service and general business policy, without an agreement or understanding between them to do so. If C&S arranged voluntarily to operate its Atlanta banks as "*de facto*" branches of its largest competitor (Trust Company of Georgia), to use the name, logo, and business methods and follow the ad-

[20] In *Container* the Court held that a reciprocal arrangement among competitors to exchange information, albeit infrequently and irregularly, about past price quotations to specific customers, constituted a combination or conspiracy in violation of Section 1 of the Sherman Act, because it "chill[ed] the vigor of price competition" (393 U.S. at 337), even though the information was often otherwise available. *Id.* at 335. In the present case, price competition was not just chilled, it was eliminated.

vice of Trust Company, and if Trust Company actively furthered that plan by supervising the C&S banks and providing price information and advice, C&S and Trust Company would indubitably have entered into an agreement or understanding that violates Section 1.

The present arrangement between C&S and the independent five-percent banks accomplished the same anti-competitive objective and equally violates Section 1. Although there is no formal agreement contractually committing the appellees to the course of operation they have pursued, their informal or tacit agreement, as evidenced by their business behavior, is sufficient proof of the offense. See *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 227; *United States* v. *Masonite Corp.*, 316 U.S. 265, 275–276; *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 723; *United States* v. *General Motors Corp.*, 384 U.S. 127, 142–143.

The district court appears to have been influenced by the "voluntariness" of the arrangements, for it concluded that C&S's practice of providing price information to the five-percent defendant banks merely furnished an "expert appraisal" of the market to which the recipient "would naturally be expected to pay great attention" (J.S. App. 24a), and that its use resulted from the "natural deference" of the recipient rather than from an express or tacit agreement (*id.* at 29a).

Insofar as the district court concluded that the challenged relationships do not offend Section 1 because they were voluntarily entered into and maintained, it committed clear legal error. "It is of no

consequence, for purposes of determining whether there has been a combination or conspiracy under § 1 of the Sherman Act, that each party acted in its own lawful interest. Nor is it of consequence for this purpose whether * * * [the objects of the collaborative action] are lawful or economically desirable." *United States* v. *General Motors Corp., supra,* 384 U.S. at 142. Joint restraints of trade are normally motivated by self-interest, because they can be highly profitable if successful.

All understood, moreover, that the *de facto* branch arrangements are voluntary, so that "[t]here was of course freedom to withdraw from [them] * * *," as in *United States* v. *Container Corp. of America, supra,* 393 U.S. at 335, and as is true in any case in which an agreement short of an enforceable contract is sufficient to carry out a common program. In fact, the five-percent bank at Stone Mountain did withdraw from the arrangement (see pp. 11–12, *supra*).

As in *Container, General Motors,* and other cases (see p. 33, *supra,* n. 19), the necessary agreement or combination inheres in, and may be inferred from, the appellees' course of conduct. The district court's ruling that their conduct is not the result of a tacit agreement or combination is thus contrary to the decisions of this Court.

B. THE *DE FACTO* BRANCH ARRANGEMENT CHALLENGED HERE IS MATERIALLY DIFFERENT FROM AN ORDINARY CORRESPONDENT BANK RELATIONSHIP

As we have noted (see pp. 17–18, *supra*), in discussing the Sherman Act claim (but not the Clayton Act

claim), the district court characterized the difference between a correspondent relationship and the relationships or arrangements at issue here as "merely one of degree" with no significant variance between them (J.S. App. 28a). Since the government has "condoned" correspondent relationships, the district court reasoned, the incidents of that relationship cannot violate the Sherman Act (*id.* at 28a–29a). The district court's conclusion that the challenged *de facto* branch arrangements do not violate the Sherman Act is based, however, on an apparent misconception of the nature of a correspondent relationship.

There is in fact little similarity between the ordinary correspondent bank relationship and the *de facto* branch relationship involved here. A correspondent relationship is essentially a vertical relationship between banks in which a large bank furnishes services to a smaller bank,[21] and the smaller bank agrees either to maintain a "correspondent balance" with the larger bank or to pay it an agreed fee (App. 51–72, 99–113, 136–141; GX 193; App. E-251—E-267; GX 194; App. E-268). The correspondent services might include a

[21] Correspondent services may include clearing checks and transit items, loan participations, reports on money market developments, security safekeeping, international transactions, credit information, and many other matters. See generally Knight, *Correspondent Banking, Pt. I; Balances & Services*, Monthly Review of The Federal Reserve Bank of Kansas City (November 1970), p. 3; *Correspondent Relations: A Survey of Banker Opinion*, Subcommittee on Domestic Finance of the House Committee on Banking and Currency, 88th Cong., 2d Sess.; see also Austin and Solomon, *A New Antitrust Problem: Vertical Integration in Correspondent Banking*, 122 U. Pa. L. Rev. 366, 367–371 (1974).

number of the kinds of services made available by C&S to the five-percent banks.[22]

But an ordinary correspondent bank would not subject itself to C&S's direction, would not regularly interchange officers and employees with C&S, would not use the C&S name or hold itself out as part of the C&S System, and would not be so linked with C&S as to act as though it were in fact a branch belonging to C&S. Indeed, C&S does not have the kind of relationship it has with the five-percent banks with any of the independent banks with which it has a "correspondent" relationship (App. 438–440). In short, it is simply not an aspect of a "normal" correspondent relationship for the smaller purchasing bank to relinquish its independence by agreement with its larger supplier and to operate, as the appellee banks did in this case, as if both banks comprised a single banking organization.

C. C&S'S ROLE IN ORGANIZING THE FIVE-PERCENT BANKS DOES NOT MAKE THE ARRANGEMENT LAWFUL

The district court noted that the practices complained of existed from the time each bank except Tucker began operating (a time when C&S could not branch *de novo* into their localities) and that in *United States* v. *Marine Bancorp.*, No. 73–38, decided June 26, 1974, the government had encouraged the sponsorship of new banks as part of a procedure for geographic

[22] As C&S's former branch supervisor testified with respect to the relationship between C&S and the five-percent defendant banks, "there is a great deal of interdependence to a great degree not present in a correspondent bank [relationship]" (App. 415–416).

market expansion (J.S. App. 22a–23a, 29a). The court thus indicated that it held the challenged arrangements lawful at least in part because C&S assisted the organization of the five-percent defendant banks (except Tucker), and, from their inception, they have voluntarily operated as C&S's branches. The district court's reasoning is erroneous.[23]

From their inception the five-percent defendant banks were legally-independent business entities which C&S did not have the power to control, and the expectations of the parties involved in the banks' creation are legally immaterial to the question whether the *de facto* branching arrangements offend the Sherman Act.[24]

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[23] There is no evidence in the record that C&S or the five-percent banks relied upon business review procedures or other advice from the government concerning the legality of their arrangements. Although there is some suggestion in the district court's opinion that the government was aware of the arrangements at the time the Federal Reserve Board investigated them in 1968 (J.S. App. 27a), the government's failure to challenge them at that time creates no estoppel. Cf. *United States* v. *New Orleans Chapter, Assoc'd Gen'l Contractors*, 382 U.S. 17, reversing *per curiam* 238 F. Supp. 273 (E.D.La.); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 623, 624; *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 225–228. We have set forth in the Jurisdictional Statement (pp. 29–32) the reasons why there is no inconsistency between the government's position in this case and its position in *Marine Bancorp.*

[24] In any event, C&S's branch arrangement with Tucker Bank could not be justified as valid under Section 1 because of C&S's participation in the organization of Tucker Bank. Tucker was organized without C&S's assistance long before it agreed in 1965 to operate as C&S's *de facto* branch, but in 1970 C&S stressed the non-competitive relationship that had developed between them in unsuccessfully seeking the FDIC's approval

Although appellees contended that (except for Tucker Bank) C&S was so intimately involved in assisting the organization of the five-percent defendant banks that their organization and operation should be treated as internal expansion by C&S, the district court declined to decide who initiated the organization of the banks, *i.e.,* "[w]hether the organization of these banks was the 'brain child' of C&S National, or of local leaders * * *" (J.S. App. 10a). It found only that C&S's assistance was a result of its inability to expand directly into the localities involved, and of its "hope that [such assistance or participation] * * * would be the forerunner of much larger interests in the future" (*id.* at 11a). But the legality of the voluntary decision of the five-percent defendant banks to act as C&S's branches and C&S's decision to treat them as such does not depend upon whether the initial impetus for the organization of the banks came from C&S or from local businessmen, or whether C&S's assistance was motivated by a desire to establish branches indirectly where state law prohibited it from branching directly.

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of its acquisition of Tucker Bank. Yet the district court held C&S's relationships with Tucker Bank legal. Under the district court's standard, then, an agreement between separate and independent firms that they will not compete with each other may be lawful. (This would be contrary to *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 135–136, where this Court held illegal *per se* a joint arrangement whereby two separate and independent newspapers eliminated all significant commercial competition between themselves but continued separate editorial competition.) Under the district court's rationale, the resulting lack of competition between such separate firms could then be asserted as a defense to an amalgamation of the firms that would otherwise violate Section 7 of the Clayton Act.

To assist in the organization of a new bank to be operated as a *bona fide* independent institution, in the hope of acquiring it in the future, is materially different from assisting in the organization of a new bank, as was done here, that is to be operated as a branch office of its sponsor despite its legal and factual independence.

Organizers of new banks often look to existing banks for organizational assistance, and existing banks may be willing to provide such assistance for a number of valid business reasons. New banks usually require substantial financial and technical assistance in order to become established (App. 76–78, 115–116; see App. 581–582),[25] and it is most readily available from existing banks. Such assistance includes helping in preparing the charter application, finding a chief executive officer, acquiring and training personnel, locating a site, advertising and promoting the venture, helping with pension and profit sharing plans, participating in loans with the new bank, and providing general counseling (App. 77–83, 115–116).

A large bank's usual motive for such organizational assistance is to obtain the new bank's correspondent business, since the sponsoring or assisting bank has a substantial advantage in this respect (App. 77–78, 116). A bank may also sponsor a new bank in the hope of acquiring it at a later time as a means of entering a new market (App. 121–122, 125–126; GX 106, 106A; App. E–113—E–120). Thus, sponsoring or assisting a new bank may be lawful and pro-competitive, pro-

[25] The availability of this kind of assistance is a factor relied upon by bank regulatory authorities (see J.S. App. 46a–49a).

vided that the new bank is operated as a *bona fide* independent institution in conformity with its legal status and does not determine its competitive conduct jointly with its sponsor or other competitors.

In this case, however, these conditions were not met. Instead, the five-percent defendant banks whose organization C&S assisted, as well as Tucker Bank, voluntarily became C&S's vassals, pursuant to agreements or understandings between them. Legally-independent banks which otherwise would have been competitively independent of C&S have operated as though they are part of a single economic enterprise—the C&S System. Whether termed *"de facto* branching," "voluntary control," or "elaborate and effective, although informal, linkages" (Mo. to Aff. 10), these arrangements eliminate horizontal competition between C&S and the five-percent banks and thus constitute combinations or agreements proscribed by Section 1. See *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 135–136.

Moreover, the application of the Sherman Act to banking relationships cannot feasibly depend upon which of several possible motives led an existing bank to sponsor a new bank; the problems of proof and the ambiguities inherent in such a standard would create great uncertainty for the banking community, the government and the courts. Rather, the standard must be the same as it is for firms in other industries: legally-independent business entities may not agree, tacitly or otherwise, to forego competing with each other. *E.g., Citizen Publishing Co.* v. *United States*, *supra*. Under that standard, the agreements between

C&S and the five-percent defendant banks to operate substantially as a single economic enterprise are unlawful.[26]

D. C&S'S PURPOSE OF AVOIDING THE LIMITATIONS OF STATE LAW DOES NOT JUSTIFY ITS ARRANGEMENTS WITH THE FIVE-PERCENT BANKS

Appellees apparently contend that the agreements between C&S and the five-percent banks do not violate Section 1 of the Sherman Act because, but for the restrictions of Georgia law, the five-percent defendant banks (other than Tucker Bank) would have been

[26] Where one bank assists in the organization of a new bank, it is to be expected that the "sponsoring" bank may initially play a relatively significant role in determining the new bank's retail banking practices. As the new bank becomes established, however, it is also expected to make its own competitive decisions. Thus, the testimony of a former Georgia Superintendent of Banking indicates that it is expected that a new bank will rely on its usually larger correspondent bank for advice in its early stages, but that the new bank or its directors should not make it "a habit of relying on someone else to make the decisions for you continuously. I think you should acquaint yourself as far as possible with banking transactions and matters and act upon your own judgment" (App. 585–586; see also GX 216, pp. 13–15; App. E–282—E–284). Similarly, an official of Trust Company, a competitor of C&S in Atlanta which has sponsored new banks (App. 76–78), testified that "in the beginning * * * [Trust Company is] a little closer in contact [with the new bank] because of the day-to-day problems. Everything is new and different, they get hit with an awful lot at one time. So, the older they are and more experienced they have had, really, probably the less contact you would have with them in that respect" (App. 81–82). The assistance a sponsoring bank offers a fledgling bank in establishing sound banking practices is, of course, not involved in this case. The "new" banks here had been in operation for from two to twelve years at the time of suit and are substantial institutions with assets of from $5 million to $22 million (Tucker Bank has been in existence for more than 50 years and its assets exceed $26 million).

established as C&S branches rather than as legally-independent entities. As authoritatively construed by the Georgia Supreme Court, however, Georgia law required that the five-percent banks be legally-independent institutions separate from C&S, and prohibited appellees' circumvention of this requirement through the *de facto* branch arrangements challenged here (see p. 20, *supra*). Thus, the Georgia Supreme Court's conclusion that C&S was indirectly controlling more than five percent of the banks' stock in violation of state law was based in part on the fact that C&S was "treating such banks as [its] branch banks * * *." *Citizens & So. Nat'l Bank* v. *Independent Bankers Ass'n of Ga., Inc., supra,* 202 S.E. 2d at 80.

Conduct that violates the Sherman Act cannot be justified on the claim that the purpose of the challenged agreement or combination was to try, albeit unsuccessfully, to avoid the limitations of state law.

II

THE BANK HOLDING COMPANY ACT DOES NOT GIVE THE FEDERAL RESERVE BOARD EXCLUSIVE PRIMARY JURISDICTION OVER THE CONDUCT CHALLENGED IN THE SHERMAN ACT CLAIM

The district court erred in concluding that the Bank Holding Company Act of 1956, 70 Stat. 133, as amended, 12 U.S.C. 1841, *et seq.,* vests in the Federal Reserve Board "exclusive primary jurisdiction" over the conduct challenged in the Sherman Act count of the complaint (J.S. App. 26a). The Bank Holding Company Act gives the Federal Reserve Board no authority, express or implied, to immunize

that conduct from the operation of the antitrust laws. Intended to regulate the formation and external expansion of bank holding companies, the Act is concerned with the structure of banking markets and entry by banks into non-banking activities, but not with the current competitive behavior of banks in their banking activities.[27]

[27] As the Senate Committee on Banking and Currency noted in its report on the bill substantially enacted as the Bank Holding Company Act of 1956 (S. Rep. No. 1095, 84th Cong., 1st Sess., p. 2):

"Chairman Martin [of the Board of Governors of the Federal Reserve System] noted that the principal problems in the bank holding company field arise from two circumstances: (1) The unrestricted ability of a bank holding company group to add to the number of its banking units, making possible the concentration of commercial bank facilities in a particular area under a single control and management; and (2) The combination under single control of both banking and nonbanking enterprises, permitting departure from the principle that banking institutions should not engage in business wholly unrelated to banking. Such a combination involves the lending of depositors' money, whereas other types of business enterprise, not connected with banking, do not involve this element of trusteeship. Your committee is of the opinion that this bill [S. 2577, 84th Cong., 1st Sess.] will enable the Federal Government to cope more adequately with both of these problems. Like H.R. 6227 [84th Cong., 1st Sess.], the bank holding bill passed by the House of Representatives, this bill empowers a regulatory agency to pass upon the application of a bank holding company for the acquisition of a substantial number of voting shares in one or more additional banks. The bill also follows the principle laid down in H.R. 6227 that bank holding companies must divest themselves, within a specified period, of nonbanking assets not closely related to banking activities. Thus, under the bill, the growth of bank holding companies in the banking field would be regulated but not prohibited. However, bank holding companies would no longer be authorized to manage or control nonbanking assets unrelated to the banking business."

The Act provides that both the formation of bank holding companies and certain specified external expansion by such holding companies or their subsidiaries must be approved by the Federal Reserve Board. 12 U.S.C. 1842. As enacted in 1956, the Act made the legality of an unapproved relationship between a bank holding company and an existing bank depend solely upon whether the holding company had "control" over the bank. 12 U.S.C. 1841(a)(1). Section 2(a) of the Act, 70 Stat. 133, defined control as direct or indirect power to vote 25 percent or more of the bank's stock, or the control, directly or indirectly, of election of a majority of the bank's directors. See 12 U.S.C. 1841(a)(2)(A), (B). As amended in 1970, the Act also provides that a company has "control" over a bank if it directly or indirectly exercises a controlling influence over the management or policies of the bank. 84 Stat. 1761, 12 U.S.C. 1841(a)(2)(C).[28]

The Act provides for Board action only if there is an "acquisition, merger, or consolidation" or an issue of "control"; no other Board review is provided, even for conduct that may violate the Sherman Act. For example, the Act does not authorize the Board to review price fixing, boycotts, or allocations of customers or territories, engaged in by banks or bank holding companies, or any other anticompetitive activity that might violate the antitrust laws.[29]

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[28] A bank holding company "subsidiary" is defined by the same three criteria. 12 U.S.C. 1841(d)(1)-(3).

[29] The Bank Holding Company Act Amendments of 1970 (84 Stat. 1766), added a prohibition of certain tying arrange-

Furthermore, the Act confers immunity from the antitrust laws only in one limited, carefully-defined circumstance. If an "acquisition, merger, or consolidation transaction" is approved by the Board pursuant to 12 U.S.C. 1842 and is not challenged in a suit filed by the United States within 30 days, that approved transaction may not thereafter be attacked in any judicial proceeding on the ground that it "alone and of itself" violates any antitrust laws, except Section 2 of the Sherman Act, 15 U.S.C. 2, concerning monopolies. 12 U.S.C. 1849(b). In all other cases Section 11(a) of the Act, 12 U.S.C. 1849(a), expressly preserves antitrust remedies:

> Nothing herein contained shall be interpreted or construed as approving any act, action, or conduct which is or has been or may be in violation of existing law, nor shall anything herein contained constitute a defense to any action, suit, or proceeding pending or hereafter instituted on account of any prohibited antitrust or monopolistic act, action, or conduct * * *.

The conduct challenged by the government's Sherman Act claim does not constitute an "acquisition, merger, or consolidation transaction" of the kind described in 12 U.S.C. 1842(a) under any reasonable

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ments by banks or bank holding companies. 12 U.S.C. 1971, *et seq.* While the Amendments authorize the Federal Reserve Board to create exceptions—consistent with the purpose of the statute—to these prohibitions, 12 U.S.C. 1972, they also make clear that the anti-tying provisions do not affect actions under other federal laws or state laws. 12 U.S.C. 1976.

definition of those terms.[30] Accordingly, even if the Board of Governors had authorized the challenged conduct, the antitrust immunity provision in 12 U.S.C. 1849(b) would be inapplicable. In fact, of course, the Board has not done so and has never asserted power to do so.

In 1968, the Board's staff investigated the relationship between C&S and the five-percent banks and determined that it did not violate the Act, because, while the Board had not approved it, the relation-

[30] The complaint is directed, not at C&S's initial "acquisition" of a five-percent stock interest in the five-percent banks, but rather at their respective activities since then, including their continuing agreement and understanding to act noncompetitively, as if the five-percent banks were legally-controlled branches of C&S. This course of conduct does not constitute a "merger" or "consolidation" in any sense. Nor does it constitute an "acquisition." If C&S had "acquired" the other banks it would have gained legal control of them. See *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 332, n. 7, 336, n. 13. Yet, C&S has repeatedly disavowed having control of those banks (see, *e.g.*, p. 26, *supra*, n. 13).

Because the challenged arrangements do not constitute an "acquisition, merger, or consolidation transaction" within the meaning of Section 1842(a), there is also no merit to appellees' arguments, not reached by the district court, (1) that the three five-percent relationships antedating the Bank Holding Company Act of 1956 (Tucker, Sandy Springs and Chamblee) are protected by the "grandfather" provision conclusively presuming that an "acquisition, merger, or consolidation" of the kind described in 12 U.S.C. 1842(a) consummated prior to July 1, 1966, did not violate the antitrust laws (12 U.S.C. 1849(d)), and (2) that the Sherman Act is inapplicable to anticompetitive conduct of bank holding companies after that date because, under 12 U.S.C. 1849(e), a court having before it a government antitrust action with respect to an "acquisition, merger, or consolidation transaction" of the kind described in 12 U.S.C. 1842(a) is required to apply the substantive rule of law set forth in Section 1842.

ship did not involve the elements of "control" then specified in the Act (see p. 46, *supra*). The Board took no formal action on this matter, however;[31] moreover, as previously shown, even if it had approved the relationship, that action would not have conferred antitrust immunity.

The district court's ruling that the Bank Holding Company Act precludes an antitrust court from entertaining the government's Sherman Act claim not only ignores the Holding Company Act's express language to the contrary, it also fails to heed this Court's often repeated admonition that repeal of the antitrust laws by implication is not favored. See, *e.g.*, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 350–351; *United States* v. *Borden Co.*, 308 U.S. 188, 198.

When faced with regulatory schemes even broader and more intrusive into company affairs than the Bank Holding Company Act, this Court has refused to hold that they were so pervasive as to preclude entirely the application of the antitrust laws to the regulated firms.[32] Rather, the Court has carefully examined the specific conduct in question in order

[31] See letter from Tynan Smith, Secretary of the Federal Reserve Board, to Donald I. Baker, Director of Policy Planning, Antitrust Division, Department of Justice, dated March 15, 1972 (GX 177 B; App. E-232—E-234; J.S. App. 18a–20a).

[32] See *Otter Tail Power Co.* v. *United States*, 410 U.S. 366; *United States* v. *Philadelphia Nat'l Bank*, *supra*, 374 U.S. at 350–355; *Silver* v. *New York Stock Exch.*, 373 U.S. 341, 357; *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 311–312; *California* v. *Federal Power Commission*, 369 U.S. 482, 485; *United States* v. *Radio Corp. of America*, 358 U.S. 334, 351; *United States* v. *Borden Co.*, *supra*, 308 U.S. at 198;

to determine whether subjecting that conduct to antitrust liability would create a basic and irreconcilable conflict with the authority of the regulatory agency. Such a conflict will justify finding a limited repeal of the antitrust laws only where three factors are present: (1) the precise conduct challenged in the antitrust action must be subject to the regulatory agency's remedial powers; (2) the regulatory scheme must require the agency to focus upon competitive considerations in exercising those powers; and (3) the agency must have express statutory authority to immunize the conduct from the antitrust laws. *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 385–389; *United States* v. *Philadelphia Nat'l Bank*, *supra*, 374 U.S. at 351; *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 305–309.[33]

United States v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 314–325; cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U.S. 117.

[33] For example, in *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, a power company contended that its refusal to sell wholesale power was immune from antitrust challenge by reason of the Federal Power Act, which authorized the Federal Power Commission to order interconnections to its distribution system. This Court disagreed, reasoning that Congress had not created a pervasive regulatory scheme for the interstate distribution of power, that the legislative history of the Federal Power Act revealed no intention to insulate the challenged conduct from antitrust attack, and, finally, that the Commission's authority to order interconnection is limited and not focused on the antitrust issues.

However, in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, *supra*, the Court held that an antitrust suit challenging the manner in which Toolco had exercised its controlling interest in TWA should have been dismissed because (1) the Civil Aeronautics Board had investigated and approved their rela-

These criteria are not satisfied here. The Bank Holding Company Act calls for no determination by the Board relevant to any issue in the government's Sherman Act claim. That Act authorizes the Board to determine whether or not the relationship between a bank holding company and a bank amounts to "control" so as to invoke the other provisions of the Act. But the Board's determination on this jurisdictional issue does not determine any aspect of the Sherman Act claim.

Even if the Board had held that C&S controls the five-percent banks and had approved that control, that ruling would not have immunized from challenge under the Sherman Act the anticompetitive agreements such control produced. Congress, moreover, has expressly provided that the Board's decisions on the control issue do not create an antitrust defense (see p. 47, *supra*).

The district court's reliance upon *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.,* 379 U.S. 411, was misplaced. That case did not involve relationships between existing banks claimed to violate the antitrust laws, but rather a question of the proper forum in which to litigate the legality, under state branching law, of the organization of a new bank by a bank holding company. Opponents of the new bank

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tionship pursuant to its express statutory mandate to approve acquisitions that are consistent with the public interest and do not result in monopoly, and (2) such decisions of the Board were expressly immunized from antitrust attack by Section 414 of the Federal Aviation Act of 1958, 49 U.S.C. 1384. 409 U.S. at 386.

sought to litigate their claims in a suit to enjoin the Comptroller from issuing a charter for the bank, without waiting for the Federal Reserve Board to determine whether the holding company acquisition would violate state branching restrictions. See *id.* at 418–419; cf. 12 U.S.C. (1958 ed.) 1842(c)(4), 1846.

In those circumstances this Court held that, since the issues raised were "cognizable by the Federal Reserve Board," proceedings before the Board were "the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested" (*id.* at 419). This ruling obviously referred to the type of "questions" raised in that case. The Court did not suggest that *all* questions concerning relationships among existing banks must automatically be referred to the Board, even when, as here, the questions do not involve issues cognizable by the Board.

III

SECTION 7 OF THE CLAYTON ACT PROHIBITS C&S'S ACQUISITION OF THE FIVE-PERCENT BANKS

C&S's proposed acquisitions of the five-percent defendant banks would give it legal control of an undue share of concentrated markets and would significantly increase concentration in those markets. Accordingly, the acquisitions would presumptively violate Section 7 of the Clayton Act, under established standards for judging the legality of mergers or acquisitions of banks operating in the same market. *United States* v. *Philadelphia Nat'l Bank, supra,* 374

U.S. at 362–366; *United States* v. *Phillipsburg Nat'l Bank & Trust Co.*, 399 U.S. 350, 365–367.[24]

The district court declined to apply this well-established structural analysis because the parties to the proposed acquisitions are currently operating as though they are already merely parts of the same economic enterprise. Instead, it termed the absence of existing competition between the parties the "crucial factor" in a Section 7 case, and held it legally irrelevant whether that absence results from "legally effective stock ownership control" or a voluntary arrangement of the parties (J.S. App. 66a).

Section 7 of the Clayton Act was intended to "arrest apprehended consequences of intercorporate relationships before those relationships could work their evil" and to block anticompetitive relationships "in their

[24] "[F]or purposes of discussion" (J.S. App. 31a), the district court looked to the sections of the country that the government considered to be the relevant markets, *i.e.*, DeKalb County, North Fulton County, Fulton County, and the Atlanta metropolitan area. It found, for this purpose, a high degree of concentration in each (J.S. App. 31a–42a) which would be increased. In the Atlanta area, where the top two banks have 53.2 percent of total deposits and the top four 84.2 percent, the merger would raise C&S's share as market leader from 30 to 32 percent, and reduce the total of area banking organizations by 16 percent, *i.e.*, from 31 to 26. In DeKalb County, where C&S had 24.1 percent of deposits, the top two banks have 38.3 percent and the top three 51.8 percent, the merger would increase C&S's share by almost 40 percent to 34.5 percent. In North Fulton County, where C&S had 1.7 percent of deposits, the top two banks have 57.8 percent and the top four, 80.3 percent, the acquisition would increase C&S's share to 48.3 percent, twice the share of the second largest organization. In Fulton County, which is also highly concentrated, the increase would be 1.1 percent (*ibid.*).

incipiency," before they could develop into full-blown violations of the Sherman Act. *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U.S. 586, 597; cf. *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 318, n. 32. It would turn Section 7 on its head to permit the appellees to justify these acquisitions, which *prima facie* violate that Section because of the significant increases in concentration they would produce, on the ground that, as a result of their prior violations of Section 1 of the Sherman Act, they have already eliminated the competition that Section 7 is designed to protect. Yet that is the basic thrust of their argument and the district court's decision: that since the appellees' agreements and understandings have eliminated competition between C&S and the five-percent banks, the effect of C&S's acquisition of those banks necessarily cannot be substantially to lessen competition. Appellees cannot justify their violation of Section 7 by relying upon their prior violation of Section 1.

The district court apparently believed its analysis compelled by this Court's summary affirmance of the district court's decision in *United States* v. *Trans Texas Bancorp., supra,* a case it regarded as "almost squarely in point" (J.S. App. 60a). In that case Sam Young, the founder, principal stockholder and chief executive of El Paso National Bank, had earlier been instrumental, along with other stockholders of that bank and a close group of their business associates and relatives, in establishing three other, smaller banks in El Paso, which El Paso National proposed

to acquire. Young, his son, and this group had voting control of all four banks.

On the basis of its finding that a closely-knit group of stockholders always had the power to control the banks' competitive behavior, the district court concluded that the four combining banks could not be viewed as independent competitive entities. The existence of this "control group," its ability to impose its will on each of the combining banks, and the consequent lack of power in each of the combining banks to make its competitive decisions independently, led the court to conclude that there was no competition among them and that their formal union thus would have no adverse competitive effects. If, as the district court found in *Trans Texas,* control of the combining banks by a single group of stockholders which owned a majority of each bank's stock existed, then the banks "lacked competitive capabilities and there was no actual competition among them." 1972 Trade Cases at p. 93,213.

Trans Texas does not hold, however, that bank mergers are not to be tested by traditional Section 7 standards in situations like the present one, where legally-independent banks have voluntarily chosen to operate as though they are commonly-owned.[35]

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[35] No claim has been made here that C&S or a C&S "control group" has the power to determine the competitive behavior of the banks C&S proposes to acquire. Indeed, the district court specifically found that even the elimination of any common ownership by complete stock divestiture would not affect the banks' competitive behavior (J.S. App. 65a–66a, 67a–68a)—their *de facto* branch arrangements would remain unchanged.

The fact that legally-independent competitive entities have in the past behaved, and may be inclined in the future to behave, in a non-competitive manner, is ordinarily irrelevant in assessing under Section 7 the legality of their formal, permanent union. Section 7 is designed to foster competitively-structured industries. Its rationale is that the greater the number of independent decision-making entities in a particular market, the less likely it is that they will adopt parallel competitive policies of mutual advantage.

This Court has held to be particularly important to this end the preservation of independent entities in markets that are already highly concentrated, as are most local banking markets, including those involved here. See *United States* v. *Marine Bancorp., supra,* slip op. 28; *United States* v. *Philadelphia Nat'l Bank, supra,* 374 U.S. at 365, n. 42; *United States* v. *Aluminum Co. of America,* 377 U.S. 271, 279–280. It is for this reason, as this Court recently observed, that "the Government * * * [may] rest its case on a showing of even small increases of market share or market concentration in those industries or markets where concentration is already great or has been recently increasing * * *." *United States* v. *General Dynamics Corp.,* 415 U.S. 486, 497. See also *Elko Prods. Co.* v. *Federal Trade Commission,* 347 F. 2d 745 (C.A. 7).

Appellees will presumably seek to support the district court's ruling that "disassociation" of the five-percent banks from C&S is unlikely even if they are not acquired (J.S. App. 65a) by arguing that the five-percent defendant banks would not "forfeit" the benefits of the existing *de facto* branch arrangements by

voluntarily separating themselves from C&S, and that C&S would not "expel" them from its system and thereby compel them to operate as independent competitors.[36] But the legality under Section 7 of the permanent union of the independent banks involved in this case does not depend upon a judgment whether, if the acquisitions are prohibited, the five-percent banks are likely to continue the existing relationship. To accept appellees' arguments that the *de facto* branch arrangement was merely "a method of creating new suburban branches" and that C&S would not now "expel" them from its system lest it find itself wholly-excluded from the suburban market, would be to treat the five-percent banks as *de facto* subsidiaries and to disregard fundamental concepts of ownership and control upon which corporate law depends (pp. 28–31, *supra*).[37] It would also require that state law

[36] While the likelihood of a "breakaway" by a five-percent bank from C&S was referred to by the Department of Justice in its second competitive report to FDIC (GX 38; App. E-38—E-56), as well as in the district court, it was not suggested that the sole test under Section 7 was whether the five-percent banks would ultimately break away.

[37] Since the firms in this case are independent entities, the case does not present the question whether less-than-majority stock control could ever result, for antitrust purposes, in loss of a firm's legal status as an independent entity. Even wholly-owned corporate subsidiaries, however, may be treated as separate entities if they so represent themselves to the public. See, *e.g.*, *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, *supra*, 340 U.S. at 215. Here, conversely, independent firms have held themselves out as branches of another firm. But this does "not save them from any of the obligations that the law imposes on separate entities." *Perma Life*, *supra*, 392 U.S. at 141–142.

restrictions against *de novo* expansion be disregarded (see pp. 20–21, *supra*).[38]

Moreover, acceptance of that approach would be tantamount to accepting the legality, under Section 1 of the Sherman Act, of arrangements between independent entities pursuant to which they operate jointly. As we have shown in part I above, those arrangements are unlawful and cannot provide the basis for approving, under Section 7, the permanent combination of such independent entities.

If predictions of appellees' future competitive behavior are to be considered in assessing the legality of the union of the five-percent defendant banks with C&S,[39] such predictions cannot properly be premised on past behavior resulting from unlawful agreements

[38] In *Independent Bankers Ass'n* v. *Dunn*, *supra*, the Georgia Supreme Court noted "two conflicting philosophies concerning the banking business. There are those who believe that the control of additional banks by large financial interests will ultimately destroy independent banks and result in the domination of the economy by too few persons. There are those who believe that larger financial interests can offer a wider variety of services and can better provide the capital to meet the needs of borrowers." 197 S.E. 2d at 138. Recognizing that resolution of the conflict is a legislative determination, the court found "[t]he legislative intent * * * expressed clearly in the banking laws" (*ibid.*). " 'It is the intent of this Act to prevent the extension of statewide banking by any institution and to encourage the normal growth of banking units in the local communities . . . It is the intent of this Act to keep banking units from expanding into territories beyond their municipal corporate limits.' " 197 S.E. 2d at 138 (quoting from Section 1 of the 1960 amendments to the Georgia Banking Law (Ga. L. 1960. pp. 67–68)).

[39] Recently, the Court has indicated that a *prima facie* case under Section 7, based on the market shares of the merging firms in a concentrated market, may be rebutted by evidence that

whose continuation should be enjoined. If the five-percent defendant banks can no longer determine their competitive strategy jointly with C&S and thus behave as its *de facto* branches, they will, as a matter of business survival, have to become independent competitors in fact. Accordingly, their acquisition by C&S must be tested on that assumption, rather than on the district court's assumption that the existing unlawful arrangements will continue unchanged.

No weight should be given, moreover, to the suggestion that it would be economically disadvantageous—and therefore unlikely[40]—for C&S and the

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the market in fact performs competitively. *United States* v. *Marine Bancorp., supra*, slip op. 27-28. Here, however, the district court has held that such a *prima facie* case is rebutted by evidence of a pre-existing voluntary arrangement among the merging firms that they will *not* perform competitively. Thus, the court elevated the very non-competitive behavior Section 7 is intended to forestall into a dispositive defense. That result inverts the policy and purposes of Section 7.

[40] The prospect that the five-percent defendant banks will sever their existing arrangements with C&S if these acquisitions are enjoined is not as remote as appellees seek to portray it, as the experience of Trust Company of Georgia ("Trust Company") and Peachtree Bank and Trust Company ("Peachtree Bank") demonstrates. In 1960 Trust Company assisted in the organization of Peachtree Bank, located in the Atlanta suburbs (see GX 106A, pp. 4-5; App. E-114—E-115), at which time Trust Company purchased five percent of its stock (App. 199-200). Until recently, the Trust Company-Peachtree Bank relationship was similar in many respects to the relationship between C&S and the five-percent defendant banks, and was so close that Peachtree Bank's president described it as a member of the Trust Company "family" (App. 215). In approving the proposed merger of Trust Company and Peachtree Bank in 1971, the Federal Reserve Board concluded that "there is no reason to expect that either Trust Company or Peachtree Bank would voluntarily discontinue [their relationship] * * * if their

five-percent defendant banks to sever their existing *de facto* branch relationships. Operation of all the appellee banks as a single economic enterprise has no doubt been financially beneficial for both C&S and the five-percent defendant banks; otherwise they presumably would not have continued to operate in that fashion. But they are not required to do so. They operate pursuant to their *de facto* branch arrangements for "obvious reasons of business advantage" (Mo. to Aff., p. 4), as is true of all cartel arrangements. But even if the five-percent defendant banks should independently "follow" C&S's competitive practices so far as legally possible, they could not continue as C&S's *de facto* branches.

Moreover, a firm's expressed intention to adopt the practices of its competitor, so far as the law permits, cannot justify their merger. Otherwise, independent firms, particularly in oligopolistic industries, might have a complete defense to a Section 7 challenge to their merger. They, too, could argue that prior to their proposed merger they behaved non-competitively and even if their merger is barred they will continue to do so. Such a defense would effectively defeat the fundamental purpose of Section 7 to preserve competition by preventing horizontal mergers that in-

merger were to be prohibited" (GX 35, p. 6; App. E-20). However, when the United States sued to enjoin the merger, Peachtree Bank decided to abandon it and severed all but regular correspondent relationships with Trust Company (App. 199–201). Since its disaffiliation from Trust Company, Peachtree Bank has enjoyed excellent growth in deposits, assets and earnings, has opened two branches, and is seeking approval for another (App. 215–218).

crease concentration. See, *e.g.*, *Brown Shoe Co.* v. *United States*, *supra*, 370 U.S. at 331–334; *United States* v. *Philadelphia Nat'l Bank*, *supra*, 374 U.S. at 362–363; *United States* v. *Penn-Olin Chem. Co.*, 378 U.S. 158, 170–171; *United States* v. *General Dynamics Corp.*, *supra*, 415 U.S. at 496–497.

The decision of the district court could have particularly serious anticompetitive effects in the banking industry. It will encourage small banks operating in the same markets as large ones to adopt similar "*de facto* branch" relationships in order to profit from mutual determination of competitive strategy. Recent decisions of the Federal Reserve Board indicate that some banks have already attempted to pursue this course,[41] and there is no reason to think that this trend will not continue and increase.

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[41] See, *e.g.*, *First City Bancorp. of Texas—Meyerland Bank*, 60 F.R.B. 506; *Florida Bancorp.—Lighthouse Point Bank*, 59 F.R.B. 816; *Michigan Nat'l Corp.—First Nat'l Bank of East Lansing*, 59 F.R.B. 819; *First Int'l Bancshares, Inc.—University State Bank*, 59 F.R.B. 813; *First Tulsa Bancorp.—Southeastern State Bank*, 58 F.R.B. 289.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed.

Respectfully submitted.

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